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No. 389

In the Supreme Court of the United States

October Term, 1957

JOSEPH N. ROMM AND HELEN K. ROMM, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11-22) is not yet reported. The memorandum findings of fact and opinion of the Tax Court (Pet. 22-35) are not reported.

JURISDICTION

The judgment of the Court of Appeals (Pet. 22-A) was entered on May 27, 1957. The petition for a writ of certiorari was filed on August 20, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether the Tax Court had jurisdiction to hear this case although the Commissioner's notice of deficiency was addressed to taxpayer [1] and his wife and subsequently the Commissioner conceded that taxpayer's wife is not liable for the deficiencies.

2. Whether the record warrants the Tax Court's determination, which was affirmed by the court below, that certain assets of taxpayer's wife were attributable to taxpayer's earnings and properly includible in his net worth analysis.

3. Whether the fraud penalty under Section 293(b) of the Internal Revenue Code of 1939 attaches to the original deficiency for 1946 in its entirety, unreduced by payments which were made shortly before the delivery of the deficiency notice.

STATUTE AND RULE INVOLVED

Internal Revenue Code of 1939:

SEC. 51 [2] [As amended by Sec. 11(a) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231]. INDIVIDUAL RETURNS.

* * * *

(b) *Husband and Wife.*—A husband and wife may make a single return jointly. Such a return

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[1] Taxpayer, as used herein, refers to Joseph N. Romm only.

[2] The amendment by the Individual Income Tax Act of 1944 is effective for taxable years beginning after December 31, 1943. However, the section as applicable for the years 1942 and 1943 is substantially the same.

may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several. No joint return may be made if either the husband or wife is a nonresident alien or if the husband and wife have different taxable years. The status of individuals as husband and wife shall be determined as of the last day of the taxable year.

* * * *

(26 U.S.C. 51.)

SEC. 271 [As amended by Sec. 14 (a) of the Individual Income Tax Act of 1944, *supra*].

DEFINITION OF DEFICIENCY.

(a) *In General.*—As used in this chapter in respect of a tax imposed by this chapter, "deficiency" means the amount by which the tax imposed by this chapter exceeds the excess of—

(1) the sum of (A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus (B) the amounts previously assessed (or collected without assessment) as a deficiency, over—

(2) the amount of rebates, as defined in subsection (b) (2), made.

* * * *

(26 U.S.C. 271.)

SEC. 272. PROCEDURE IN GENERAL.

(a) (1) [As amended by Sec. 203 (a), Act of December 29, 1945, c. 652, 59 Stat. 669]. *Peti-*

tion to the Tax Court of the United States.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final.

* * *

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(26 U.S.C. 272.)

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

* * * * *

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3612 (d) (2).

(26 U.S.C. 293.)

Rules of Practice Before the Tax Court of the United States (Rev. August 15, 1955):

RULE 6. PROPER PARTIES.

The proceeding shall be brought by and in the name of the person against whom the Commissioner determined the deficiency [or liability, as the case may be], or by and in the full descriptive name of the fiduciary legally entitled to institute a proceeding on behalf of such person.

In the event of a variance between the name set forth in the notice of deficiency or liability and the correct name, a statement of the reasons for such variance shall be set forth in the petition. (See Rules 4, 7, and 23.)

The Commissioner shall be named as the respondent.

STATEMENT

The taxable years in question are 1942 to 1946, inclusive. For these years taxpayer filed separate individual tax returns with the Collector of Internal Revenue, Baltimore, Maryland. Taxpayer's wife filed no returns for this period. (Pet. 23.) The Commissioner determined deficiencies for the years involved, and sent a deficiency notice which was addressed to "Mr. Joseph N. Romm and Mrs. Helen K. Romm" at their correct address. (R. 5.)[3] The petition for review by the Tax Court, which contested the correctness of the Commissioner's determination in numerous respects, was brought in the names of taxpayer

[3] "R." references are to the appendix to taxpayer's brief in the Court of Appeals.

and his wife, but with taxpayer's wife appearing specially only because of the inclusion of her name in the notice of deficiency. (R. 1-5.) The Commissioner conceded, both in the Tax Court and in the Court of Appeals, that, inasmuch as taxpayer had filed separate individual returns for the period in question, only he was liable for the deficiency. (Pet. 12.) The Court of Appeals determined that, while the Tax Court had committed an inadvertent error in not limiting liability to the husband, the Tax Court had jurisdiction and that no reversible error had been committed. (Pet. 13.)

Although taxpayer has conceded the propriety of determining his income for the period involved by the net worth method (Supp. R. 33)[4] and the parties stipulated as to the correctness of the figures used in the net worth analysis (Supp. 34-41), taxpayer contends that the Tax Court and the court below erred in finding that increases in his wife's assets during the period involved were includible in the net worth analysis determining his income. (Pet. 4, 8.) The parties stipulated that as of December 31, 1941, taxpayer's wife had certain bonds and savings accounts in her own name totalling $2,258.95, and these assets increased until they totalled $9,066.94 as of December 31, 1946. (Supp. R. 34-36, Pet. 14-15, 26.) The Tax Court determined that the total of the assets in the wife's name as of December 31, 1941, adequately represented all her property as of that date,

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[4] "Supp. R." references are to the appendix to the Commissioner's brief in the Court of Appeals.

and that with two exceptions increases in the wife's assets during the taxable period were attributable to taxpayer's income. (Pet. 34-35.) The court below affirmed. (Pet. 14-16.)

The parties also stipulated that during the taxable years taxpayer had given his wife $100 per week, or $5,200 per year, for maintaining the household and defraying other personal expenses and that such sums were used for that purpose. (Supp. R. 41.) Taxpayer contends that the increases in his wife's assets during this period should not have been included in his net worth analysis because they were attributable to the $5,200 per year which he gave her and which had already been added to the increases in his own net worth in determining taxable income. (Pet. 4, 8.)

On August 11, 1954, or approximately two and one half months prior to the issuance of the deficiency notice, taxpayer made a payment toward satisfaction of the asserted deficiencies for 1946. (Pet. 30, Supp. R. 32.) Both the Tax Court and the court below held that the fraud penalty under Section 293(b) of the Internal Revenue Code of 1939 was properly computed on the basis of the deficiency on the original return, instead of on the basis of the tax remaining due after this payment was made. (Pet. 20-21, 35.)

The court below sustained the Tax Court's decision except in two minor respects.[5]

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[5] The first ordered the Tax Court to correct the inadvertent inclusion of the wife in its decision. The second allocated a $831.24 payment to principal of the deficiency, rather than to the fraud penalty, thus reducing interest. (Pet. 21-22.)

ARGUMENT

1. The court below was correct in holding that the Tax Court had jurisdiction to decide this case and that its failure to limit liability to taxpayer was not prejudicial to him. The deficiency notice was mailed to taxpayer and his wife, at their correct address. Although the deficiency notice erroneously stated that the returns filed were joint returns (R. 7-8) taxpayer was not misled thereby since a joint return imposes joint and several liability upon each spouse. Section 51(b) of the Internal Revenue Code of 1939, *supra*. Indeed, taxpayer contested the Commissioner's determination on the merits before the Tax Court, and raised this jurisdictional issue for the first time before the Court of Appeals. (Pet. 5.) Since the deficiency notice was mailed to taxpayer, received by him, and a petition was filed within ninety days, the Tax Court had jurisdiction to determine a deficiency against him. Section 272(a), Internal Revenue Code of 1939, *supra*.[6]

The decision below conflicts neither with the decision of this Court in the case of *Hulburd* v. *Commissioner*, 296 U.S. 300, nor with the Second Circuit's decision in *Bendheim* v. *Commissioner*, 214 F. 2d 26. In *Hulburd*, a deficiency was asserted against an executor who had been discharged, and under state law was no longer subject to assessment in his fidu-

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[6] There was full compliance with Tax Court Rule 6, *supra*, which is a procedural rule requiring a petition to be brought in the same names as those listed on the notice of deficiency.

ciary capacity; the executor petitioned to the Board of Tax Appeals on the ground that the assessment was invalid because the estate had been settled and the executors discharged. Here the proposed deficiency was asserted against the taxpayer, who contested the merits before the Tax Court. The *Bendheim* case held only that a deficiency notice is invalid where the entire proposed deficiency had previously been paid. Similarly, the Board of Tax Appeals and Tax Court decisions cited by taxpayer (Pet. 6-7) have no bearing on this point. And there are numerous decisions of the Courts of Appeals holding that formal defects in a deficiency notice are immaterial where not misleading, and that in any event such defects may be waived. *Commissioner* v. *Stewart*, 186 F. 2d 239 (C.A. 6th); *Olsen* v. *Helvering*, 88 F. 2d 650 (C.A. 2d); *McCarthy Co.* v. *Commissioner*, 80 F. 2d 618 (C.A. 9th), certiorari denied, 298 U.S. 655; *Buzard* v. *Helvering*, 77 F. 2d 391 (C.A. D.C.); *Commissioner* v. *Nichols & Cox Lumber Co.*, 65 F. 2d 1009 (C.A. 6th); *Haag* v. *Commissioner*, 59 F. 2d 516 (C.A. 7th); *Commissioner* v. *New York Trust Co.*, 54 F. 2d 463 (C.A. 2d), certiorari denied, 285 U.S. 556; *Burnet* v. *San Joaquin Fruit & Investment Co.*, 52 F. 2d 123 (C.A. 9th).

2. The question of whether the Commissioner properly included increases in the wife's assets during the taxable years in the computation of taxpayer's net worth is one of fact, and the court below correctly affirmed the Tax Court's determination.

The taxpayer apparently bases his contention be-

fore this Court [7] on the ground that the increases in his wife's assets during the taxable period stemmed from the $100 a week given her by her husband, and that these amounts had already been included in determining his taxable income (Pet. 4, 8); in other words, that the wife was able to save substantial amounts from her household allowance, and the increases in her assets during the taxable period represented these savings. This is primarily a question as to the credibility of the testimony presented, and was properly decided by the Tax Court. The court below found no error in this determination, and pointed out (Pet. 15) that the testimony of the wife "contained much inconsistency". Taxpayer seems incorrectly to contend (Pet. 8) that the Commissioner had the burden of showing that the wife had received funds from her husband in excess of the $5,200 a year. This Court has often recognized that the Commissioner's findings have a presumption of correctness, and the taxpayer has the burden of proving them wrong. See *Welch* v. *Helvering*, 290 U.S. 111, 115; *Old Mission Co.* v. *Helvering*, 293 U.S. 289, 294; *Helvering* v. *Taylor*, 293 U.S. 507, 515-516; *Commissioner* v. *Heininger*, 320 U.S. 467, 475. The Tax Court was clearly correct in holding that taxpayer did not sustain this burden, and the court below was correct in affirming its determination.

3. The court below did not err in holding that the

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[7] Before the Tax Court and the Court of Appeals, taxpayer also contended that these increases stemmed from savings of the wife in earlier years, but this contention has apparently been abandoned.

addition to tax for fraud imposed under Section 293 (b), Internal Revenue Code of 1939, *supra*, attaches to the entire amount by which the tax shown on the original return was understated, unreduced by a payment made shortly prior to the mailing of the deficiency notice.

Section 293(b) provides that in the case of fraud there shall be an addition to tax of "50 per centum of the total amount of the deficiency". Taxpayer contends (Pet. 9-10) that inasmuch as Section 271(a), Internal Revenue Code of 1939, *supra*, defines "deficiency" as excess of the tax legally due over the total of the tax shown on the return and amounts previously collected, then the 50 per cent addition should be computed only with reference to the tax remaining unpaid as of the time of the proposed assessment. This contention is without merit, and has been repeatedly rejected. *Middleton* v. *Commissioner*, 200 F. 2d 94 (C.A. 5th); *Still, Inc.* v. *Commissioner*, 19 T.C. 1072, affirmed *per curiam*, 218 F. 2d 639 (C.A. 2d); *Eck* v. *Commissioner*, 16 T.C. 511, affirmed *per curiam*, 202 F. 2d 750 (C.A. 2d), certiorari denied, 346 U.S. 822; *Sherin* v. *Commissioner*, 13 T.C. 221, *Hirschman* v. *Commissioner*, 12 T.C. 1223, appeal dismissed, January 10, 1950 (C.A. 2d); *Wilson* v. *Commissioner*, 7 T.C. 395.[8] As the court

[8] *Schwarzkopf* v. *Commissioner*, decided July 10, 1957 (C.A. 3d) (57-2 U.S.T.C., par. 9816), cited by taxpayer (Pet. 10), involved the applicability (not the computation) of the addition to tax for substantial underestimation of estimated tax under Section 294(d)(2) of the Internal Revenue Code of 1939 and possesses no present relevancy.

below pointed out (Pet. 21) the result of such an interpretation would be that a fraudulent taxpayer could easily avoid the imposition of the 50 per cent addition to tax by paying the tax due as soon as an investigation should be commenced, and thereby "make sport of the so-called fraud penalty".

CONCLUSION

The decision of the court below is correct, there are no conflicting decisions, and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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